No. 82-23

Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DECAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

NATHAN Z. DERSHOWITZ
Attorney for the Amicus
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

MARC D. STERN
Of Counsel

Question Presented

Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment to the United States Constitution?*

---

* The petition presented three other questions. The order of this Court granting the petition limited the writ of certiorari to the above question, 51 U.S.L.W. 3339 (1982).

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of the Amicus x

Statement of the Case 1

Summary of the Argument 6

Argument
Introduction 9

I. Symbolic Endorsements of Religion by Government Impermissibly Establish Religion 10

II. The State of Nebraska Has In Fact Symbolically Endorsed Religion by Having One Legislative Chaplain for an Extended Period 17

III. The Impact of Nebraska's Preference for One Religion Over All Others Is Substantial 29

IV. Even If A Legislature May Open Its Sessions With Prayer, It May Not Prefer One Religion Over All Others 32

V. The Historical Record Is Not Dispositive of This Case 36

VI. Payment of the Chaplain's Salary, And The Printing At State Expense, of the Prayerbooks Are Unconstitutional 48

Conclusion 55

TABLE OF AUTHORITIES

Cases

ACLU v. Rabun County Chamber of Commerce, Inc., 678 F.2d 1379 (11th Cir. 1982) 13, 28

Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973). 13, 28

Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979) 27, 42, 43

Bradfield v. Roberts, 175 U.S. 291 (1899). 51, 52

Chambers v. Marsh, 504 F. Supp. 585 (D. Neb. 1980). 3

Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982) 4, 5

Citizens Concerned v. City and County of Denver, 508 F. Supp. 823 (D. Col. 1981), app. pending (10th Cir.) 13

Colo v. Treasurer, 378 Mass. 550, 392 N.E. 2d 1195 (1979) 43

Conrad v. City and County of Denver, Colo. , P.2d (1982) 13

Cruz v. Beto, 405 U.S. 319 (1972). . 54

Donnelly v. Lynch , 525 F. Supp. 1150 (D. R.I. 1981). 13, 26

Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982) 13, 28

Engel v. Vitale, 370 U.S. 421 (1962) 11, 19, 43, 44

Everson v. Bd. of Education, 330 U.S. 1 (1947) 10, 15, 48

Fowler v. Rhode Island, 345 U.S. 67 (1953) 45, 47

Fox v. County of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) 13

Gilfillian v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1981). . . . 28

Gillette v. U.S, 401 U.S. 437 (1971) 25, 26, 45, 46

Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980). 41

Harris v. McRae, 448 U.S. 297 (1980) 25

Horn v. People, 321 F. Supp. 961 (E.D. Cal. 1968) 54

Hunt v. McNair, 413 U.S. 734 (1973) 52

Jones v. Wolf, 443 U.S. 595 (1979) 10

Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981). 13

Larkin v. Grendel's Den, Inc., 51 U.S.L.W. 4025 (1982). . 11, 12, 14, 16, 23, 24, 28, 32, 33

Larson v. Valente, 102 S.Ct. 1673 (198[illegible]. 16, 46, 47

Lemon v. Kurtzman, 403 U.S. 602 (1971) 14, 24

LeRoy Fibre Co. v. Chicago, M & St. P. Ry Co., 232 U.S. 340 (1914) 29

Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968). 43

Marsa v. Wernik, 86 N.J. 232, 430 A.2d 888 (1981). 42, 43

McCollum v. Bd. of Educ., 333 U.S. 203 (1948). 14

McCulloch v. Md., 17 U.S. (4 Wheat) 316 (1819). 40

McDaniel v. Paty, 435 U.S. 618 (1978) 51, 52

McGowan v. Maryland, 366 U.S. 420 (1961) 33

Niemotko v. Maryland, 340 U.S. 268 (1951) 44, 45, 47

Olmstead v. United States, 277 U.S. 438 (1928) 16

PEARL v. Nyquist, 413 U.S. 756 (1973) 10, 15, 27, 29

Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973) 54

Reynolds v. U.S., 98 U.S. 145 (1878) 26

Rudd v. Ray, 248 N.W. 2d 125 (Iowa 1976). 54

School District of Abington Twshp v. Schempp, 374 U.S. 203 (1963) 12, 14, 15, 53

School District of Hartington v. Nebraska State Bd. of Educ., 188 Neb. 1, 195 N.W. 2d 161, cert. denied, 409 U.S. 921 (1972) 52

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). 10

State Bd. of Educ. v. Bd of Educ., 108 N.J. Super. 564, 262 A.2d 21, aff'd 57, N.J. 172, 270 A.2d 412 (1970) 43

Stone v. Graham, 449 U.S. 39 (1980) 11, 16, 24, 25, 30

Thomas v. Indiana Employment Security Bd., 450 U.S. 707 (1981) 14

Thomas v. Schmidt, 397 F. Supp. 203 (D. N.H. 1975), aff'd, 539 F.2d 701 (1st Cir. 1976) . . . 52

Tilton v. Richardson, 403 U.S. 672 (1971) 28, 51

Torcaso v. Watkins, 367 U.S. 488 (1961) 17, 35

Treen v. Karen B., 102 S.Ct. 1267 (1982). 43

Valley Forge Christian College v. Americans United, 102 S.Ct. 752 (1982) 11

Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620 (1980). 21

Voswinkel v. City of Charlotte, 495 F. Supp. 588 (W.D. N.C. 1980). 35, 51

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 28, 37, 38, 39, 40, 41, 42, 48, 49

W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). 31

Widmar v. Vincent, 454 U.S. 263 (1981) 26, 51

Wolman v. Walter, 433 U.S. 229 (1977) 15, 27

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 47

Zorach v. Clausen, 343 U.S. 306 (1952) 42, 44

Statutes

Nebraska Unicameral Legislature, Rule 7(A)(1)(b). 1

Other Authorities

Cohen, The Myth of the Judeo-Christian Tradition (1970) 20

Heller, The Judeo-Christian Tradition Concept: Aid or Deterrent to Goodwill, 2 Judaism 132 (1953) 20

Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1981). . . 39

Stern & Gressman, Supreme Court Practice, § 6.34 (1978). 21

Story, Commentaries on the Constitution of the U. S. § 1871 (1833). 39

Tillich, Is There A Judeo-Christian Tradition, 1 Judaism 106 (1952) 20

INTEREST OF THE AMICUS

This brief amicus curiae is submitted with the consent of the parties by the American Jewish Congress, a membership organization of American Jews founded in 1918. It has as one of its chief purposes the protection of the religious, political and economic rights of American Jews and the promotion of the principles of constitutional democracy. It is particularly committed to the preservation of the great freedoms secured by the First Amendment, including most particularly the freedoms secured by the establishment and Free Exercise Clauses. It has filed numerous briefs in this Court in cases raising questions under one or both of these clauses.

STATEMENT OF THE CASE

A rule of the Nebraska Unicameral Legislature, Rule 7(A)(1)(b), provides that each legislative day shall begin with a prayer offered by the chaplain. Petitioner Robert E. Palmer, a Presbyterian clergyman, has served as legislative chaplain since 1965, [J.A. 11] and has opened most daily sessions of the legislature with a prayer. A large number of his prayers were overtly sectarian in nature. [J.A. 23; 105-08]

Reverend Palmer is presently paid slightly over $300 a month for his services, which consist solely of opening each day's meeting with a prayer. He has no other duties in his role as legislative chaplain. [J.A. 41] In three years, 1975, 1978 and 1979, the invocations were, by virtue of a resolution passed by the legislature, published at state expense and

distributed to all legislators and to the public. [J.A. 5-6] Petitioner Lewis, a member of the Executive Committee of the Unicameral, testified that a non-Christian had never served as chaplain, and had no chance of being appointed chaplain. [J. A. 26, 69-71]

Reverend Palmer testified that in his prayers he attempted to deal with current issues, in light of the Judeo-Christian heritage [J.A. 44-45; 48; 75] which he termed the "civil religion." [J.A. 75-76; 83] He explained that the forms of religious expression used were common to most Americans. [J.A. 43-45].

Respondent, Ernest Chambers, is a taxpayer and a member of the Nebraska Legislature. He is not a Christian and found himself uncomfortable at the prayers recited by Reverend Palmer. Ordinarily, in

order to avoid this discomfort, he absented himself from the chamber, [J.A. 22-4]

Respondent Chambers sought injunctive relief prohibiting 1) the retention of the current chaplain, 2) the state from paying for the chaplain's salary or for the printing of the prayers and invocations, 3) the legislature from beginning its sessions with a prayer.

The District Court, Chambers v Marsh, 504 F. Supp. 585 (D. Neb. 1980) having rejected a variety of jurisdictional and federalism challenges to its consideration of this case, determined that the Establishment Clause did not prohibit a legislature from opening its daily session with a prayer. However, it ruled that the Establishment Clause prohibited the state from paying the chaplain's salary or for the publication of his invocations. The

Court also found that, although the position of chaplain was currently established only by the internal rules of the legislature, these rules were a law for purposes of the Establishment Clause.

Both petitioners and respondent filed cross appeals with the United States Court of Appeals for the Eighth Circuit. That Court affirmed in part and reversed in part. Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982). It agreed with the District Court that the rules of the legislature were a law for purposes of the First Amendment.

However, it found it unnecessary to pass upon the question of whether the legislature could open its sessions with a prayer. Rather, it found that the retention of one chaplain over an extended period of time, and the printing of prayer

books at state expense containing only the prayers he had offered, had the effect of preferring a particular religion to the disadvantage of all others. The Court concluded (675 F.2d at 234):

> [T]he purpose of the practice as a whole must be to advance and give preference to one religious view over others. There is little other reason for singling out one minister of one denomination for such an extended period of time....

Petitioners did not appeal that portion of the District Court's judgment prohibiting the printing of prayer books.

This Court granted certiorari limited to the question of whether the retention of a legislative chaplain of one faith, over an extended period of time to deliver daily invocations in the Legislature, violated the Establishment Clause.

SUMMARY OF THE ARGUMENT

The decisions of this Court have established that government may not symbolically endorse religion in a way which suggests, in the words of Justice Stewart, that it is "throwing the weight of secular authority behind the dissemination of religious tenets." This is particularly so if government suggests that one sect is favored over others.

By selecting and paying a chaplain of one faith over a protracted period, Nebraska has symbolically suggested that this person's faith is the civil religion of the state. When coupled with the printing of this person's prayers at state expense, Nebraska announces to its citizens that the state prefers a particular sect, that it is the official religion of the state, and that its prayers, but not those of others, are properly considered by the legislature, as it undertakes its tasks.

The benefit conferred on that faith -- be it one Protestant sect, Christianity, Judeo-Christianity, or the civil religion, is substantial and direct. Nebraska's practices do not become permissible merely because they are a small step in the institutionalization of state support for religion.

Moreover, while history suggests the possibility that the framers of the First Amendment might not have considered legislative prayers unconstitutional -- a history far less certain than petitioners claim -- nothing in that history suggests that in tolerating legislative prayers, the founders intended to tolerate religious discrimination. Such discrimination, as this Court's decisions establish, and history confirms, lies at the heart of the prohibitions of the Establishment Clause.

Finally, under any view, because of the particular significance that the founders paid to not taxing citizens to support religion, the payment of the chaplain's salary, and the printing of prayer books at state expense are clearly unconstitutional. A holding to this effect would not in any way endanger the existence of prison or military chaplaincies since these are justified by the Free Exercise Clause.

ARGUMENT

INTRODUCTION

The Nebraska legislature's practice of having a paid chaplain of one faith open each day's session with a prayer over an extended period of time raises several principles of Establishment Clause jurisprudence.

The principles at issue in this case are that: 1) symbolic actions can establish religion, 2) where some government contact with religion is unavoidable, government must act with scrupulous neutrality and must not favor one sect or religion over any other, 3) government may not use religious means to achieve secular goals absent a showing that no secular means are available.

I. Symbolic Endorsements of Religion by Government Impermissibly Establish Religion

A majority of this Court's cases under the Establishment Clause involve the permissible limits of state financial assistance to religious institutions, see, e.g., PEARL v. Nyquist, 413 U.S. 756 (1973); Everson v. Bd. of Educ., 330 U.S. 1 (1947). The others generally either concern church-property disputes which, although not explicitly so based, rest on Establishment Clause principles, see, e.g., Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), or attempts by public school authorities to expose their charges to religion, requiring students to assume special burdens to avoid unwanted religious

exercises, see, e.g., Stone v. Graham, 449 U.S. 39 (1980); Engel v. Vitale, 370 U.S. 421 (1962); cf. Valley Forge Christian College v. Americans United, 102 S.Ct. 752, 766 n.22 (1982). But as this Court's recent decision in Larkin v. Grendel's Den, Inc., 51 U.S.L.W. 4025 (1982), makes clear, the Establishment Clause (and the tripartite test), contrary to the suggestion of the petitioner [Brief at 23], apply to, and invalidate, practices beyond funding of parochial schools and conducting religious practices in the public schools.

This case presents the question of whether, by choosing a chaplain of one faith over an extended period of time, and publishing his prayers, the state has

lent its prestige to that faith* in a manner proscribed by the Establishment Clause.

This Court has only recently held that symbolic endorsements of religion by government violate the Establishment Clause, Larkin v. Grendel's Den, Inc., supra, 51 U.S.L.W. at 4028, a case in which the impact of the "symbolic endorsement" (available to all faiths) was far more attenuated than that implied by Nebraska's decision to advantage one

* It is, of course, unimportant in the constitutional sense whether the prayers favor Reverend Palmer's own Presbyterian sect, all Protestants, all Christians, the Judeo-Christian tradition, or the civil religion. School District of Abington Twshp v. Schempp, 374 U.S. 203, 216 (1963). Petitioner Palmer laid heavy stress on the fact that the prayers were non-denominational, by which he apparently meant only that the prayers favored no particular religious group within Christianity [J.A. 61, 76-77; 83].

faith over an extended period of time. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit in the minds of some by reason of the power conferred."*

---

* The state and lower federal courts have had extensive experience with the principle that the Establishment Clause prohibits symbolic endorsements of religion. They have ruled that the school prayer cases and their progeny suggest that indirect governmental endorsement of religion is likewise impermissible. See, e.g., Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982, aff'g, 525 F. Supp.1150 (D. R.I. 1981); Conrad v. City and County of Denver, Colo. , P.2d (1982). Fox v. County of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978); ACLU v. Rabun County Chamber of Commerce, Inc., 678 F.2d 1379 (11th Cir. 1982); Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981). But see, e.g., Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973); Citizens Concerned v. City and County of Denver, 508 F. Supp. 823 (D. Col. 1981), app. pending, (10th Cir).

The cases of this Court have construed the Establishment Clause broadly to reach a wide variety of forms of symbolic endorsements of religion so as "to prevent, as far as possible, the intrusion of either church or state into the precincts of the other," Larkin v. Grendel's Den, Inc., supra, 51 U.S.L.W. at 4028, quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)

But even those Justices who would reduce the sweep of the Establishment Clause, Thomas v. Indiana Employment Security Bd., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting); School District of Abington Twshp. v. Schempp, 374 U.S. 203, 308 (1963) (Stewart, J., dissenting); McCollum v. Bd. of Educ., 333 U.S. 203, 238 (1948) (Reed, J., dissenting), agree that the irreducible

meaning of the Clause is that it prohibits, in the words of Justice Stewart in Schempp (374 U.S. at 314):

> government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets (footnote omitted)

Thus, government may not throw its support behind religious tenets by formally declaring that one church or the other is the official "state" religion, Everson v. Bd. of Educ., supra, 330 U.S. at 15. The state may not throw its weight behind the dissemination of religious tenets by paying for the operation of religious schools, Wolman v. Walter, 433 U.S. 229 (1977); PEARL v. Nyquist, supra.

And government may not throw its weight behind the dissemination of

religious tenets if its actions create the impression that a particular faith is favored, Larson v. Valente, 102 S.Ct. 1673 (1982) or that its beliefs are worthy of consideration. Larkin v. Grendel's Den, Inc., supra; Stone v. Graham, supra, 449 U.S. at 42. In each of these cases, government establishes religion, in the constitutional sense, no less than if it declares a particular religion to be the official state religion. The rationale for this conclusion is simple:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

II. The State of Nebraska Has In Fact Symbolically Endorsed Religion By Having One Legislative Chaplain for an Extended Period

In this case, Nebraska has thrown its weight behind the religious tenets of a religious sect.* It has announced, over a prolonged period of time, that he is the representative of religion (even if only the civil religion) in the legislature and that the particular religious views he expressed, and the forms of his prayers, enjoy official approval.

Reverend Palmer's prayers typically reflected his own religious conviction,

---

* Petitioner Lewis conceded [J.A. 26, 67-71] that it would be practically impossible for a non-Christian to be appointed legislative chaplain. The result is a de facto "religious test" for public office, undoubtedly impermissible under Torcaso v. Watkins, 367 U.S. 488 (1961).

containing, for example, frequent references to Jesus Christ. [J.A. 36-37; 105-08] They were in no sense what is sometimes called "nonsectarian."

Petitioners argue [Brief at 30] that these were not Christian prayers, but reflected the nation's tradition. Petitioner Palmer testified that his prayers were in keeping with the Judeo-Christian tradition, the "civil religion" of the United States, acceptable to most Americans. [J.A. 75-76; 83] That tradition is certainly not acceptable to American citizens who are Muslims, Buddhists or atheists, all of whom are entitled to the protection of the Establishment Clause, particularly because they are not, as petitioner Palmer testified, part of the "vast, overwhelming majority of Americans who

would [not] be offended by such prayers" [J.A. 83].

The Establishment Clause forbids the recognition of a" civil religion," for "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by the civil magistrate," Engel v. Vitale, supra, 370 U.S. at 432, quoting Madison's Memorial and Remonstrance Against Religious Assessments.

Moreover, while the concept of a Judeo-Christian tradition has some meaning as a cultural phenomenon, as applied to liturgy the concept is virtually a contradiction in terms.*

---

* Reverend Palmer testified that, in his opinion, Jesus is a major figure in the Judeo-Christian tradition [J.A. 77]. Surely, Jesus is not a major religious figure within the Jewish theological, let alone liturgical, tradition.

Prayer is the most private and intimate expression of a particular faith. As the noted theologian Paul Tillich admitted while arguing for the existence of a Judeo-Christian theological tradition, there is no Judeo-Christian tradition in liturgical matters (Tillich, Is There A Judeo-Christian Tradition, 1 Judaism 106 (1952)):

> There is, of course, a way of understanding -- I would say, misunderstanding -- the meaning of our question, namely, by referring it to the traditions which have developed in both groups .... These traditions, rites, symbols, ... doctrinal statements, ... diverge considerably from each other. But this fact is too obvious to be discussed. It is more a truism than a problem.*

* See also, Heller, The Judeo-Christian Tradition Concept: Aid or Deterrent to Goodwill, 2 Judaism 132 (1953); Cohen, The Myth of the Judeo-Christian Tradition (1970).

Nebraska did not stop at merely allowing petitioner Palmer to continue in office indefinitely. In several years, it published, at state expense, petitioner Palmer's prayers, thus reinforcing the conclusion that these prayers reflected the views of the State of Nebraska.* While it may be argued

---

* The petitioners did not appeal from that much of the District Court's order which prohibited the state from paying for the publication of prayerbooks. They did not address the issue in their brief in the court below. Nevertheless, their brief in this Court (pp. 41-44) treats the issue as open for decision.

The publication of these books formed an integral part of the scheme by which the legislature indicated its preference for a particular faith. Respondents, who were successful below, are entitled to rely on these facts here. Stern & Gressman, Supreme Court Practice, § 6.34 (1978); Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620, 634 n.8 (1980).

that the mere recitation of prayers is not unconstitutional, see pp. 36-37 infra, those arguments simply do not hold for the printing of prayerbooks. A member of the public who obtains a copy of the prayerbook can only conclude that the sect to which Reverend Palmer belongs is endorsed by the state.*

The sum total of the state's actions in this case announces to the world that

* The New York State Senate has once published the invocations offered by clergy of various faiths. A citizen reading that booklet would have difficulty concluding that the state endorsed a particular sect, given the variety of sects represented, even though none of the clergy were Muslims, for example. The amicus does not express a view as to whether New York may constitutionally do what it did. Nevertheless, the amicus believes that the contrast between this pamphlet and Nebraska's highlights the impropriety of Nebraska's actions. A copy of this pamphlet has been filed with the Clerk.

it prefers a particular sect, that it is the "civil religion" of the State, and that its teachings -- but not those of others -- are appropriate for consideration by the legislature as it begins its daily tasks.

Petitioners object (Brief at 30, 35) that, beyond Chambers' own testimony, there is no evidence in the record from which this Court could conclude that "people" have the impression that the state is endorsing a particular religion by retaining Petitioner Palmer for many years. They do not explain, nor could they, why Chambers' testimony [J.A. 29-30] is insufficient to show that "some" people, Larkin v. Grendel's Den, Inc., supra, had this impression.

More to the point, no such proof is necessary. None was offered (or thought

necessary by the Court) in Larkin v. Grendel's Den, Inc., supra. None was offered, or thought necessary, in Stone v. Graham, supra. The absence of such evidence is not mere oversight. Rather, the evidence is unnecessary because the Establishment Clause is aimed at governmental practices which give the appearance of a fusion of government and religion. It is the potential for fusion which is determinative, Lemon v. Kurtzman, supra, 403 U.S. at 619. The Establishment Clause, in other words, is

a prophylactic rule of law.*

To be sure, this Court has held that government may indirectly lend support to religious beliefs without offending the Establishment Clause. Thus, it may refuse to fund most abortions even though that policy may be, and indeed is, viewed as throwing the weight of government behind those religious beliefs which oppose the free availability of abortions. Harris v, McRae, 448 U. S. 297, 319-20 (1980). See also Gillette v.

* This is not to say that any remote possibility that government will be seen as endorsing religion is sufficient to state a claim under the Establishment Clause. At some point, the risk becomes so remote that the Constitution is not violated. The discrimination in favor of one sect here is so blatant, however, that even if there is a de minimis rule applicable, to Establishment Clause cases, see Stone v. Graham, supra, 449 U.S. at 42-3, this is not a case in which it may properly be invoked.

U. S., 401 U.S. 437 (1971); Reynolds v. U. S., 98 U.S. 145 (1878).

In each of these cases government acts for purely secular reasons. The theological impact of a facially secular practice is incidental.* In this case, the challenged action was both on its face religious, and lacking in any secular justification. Indeed, the preference for one faith expressed by Nebraska is an "important indication" that the practice lacks a secular effect. Widmar v. Vincent, 454 U.S. 263, 274 (1981).

Necessarily, a rule that some actions of government are unconstitutional because they symbolically cast the

* See Judge Pettine's discussion of a related issue in Donnelly v. Lynch, supra, 525 F. Supp. at 1165-68.

weight of government behind one sect will require the judiciary to make judgment calls. Lines will have to be drawn between arguably similar practices. The Eighth Circuit has engaged in just such a process. In this case, it found that Nebraska had gone too far; in Bogen v. Doty , 598 F.2d 1110 (8th Cir. 1979), it found that a city had only approached impermissible territory, not entered it, by permitting its public meetings to be opened with an invocation by different Christian clergy.

Exercising judgment is what courts are supposed to do. This Court has done so in the parochial school aid cases, compare Wolman v. Walter, supra, with PEARL v. Nyquist, supra, and the lower courts have done so in judging a variety of government-sponsored activities,

compare Donnelly v. Lynch, supra; ACLU v. Rabun County Chamber of Commerce, supra; Gilfillian v. City of Philadelphia, 637 F.2d. 924 (3rd Cir. 1981); Allen v. Morton, supra. One need not agree with every exercise of judgment in these cases in order to acknowledge that the Establishment Clause calls upon the courts to exercise that judgment.

Implicit in this Court's repeated warnings that the tripartite test is not to be mechanically applied is a mandate to the courts to exercise judgment, Tilton v. Richardson, 403 U.S. 672, 678 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); Larkin v. Grendel's Den, Inc., supra.

> [W]e need [not] trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized ... and between the variations ... that I suppose to exist and the simple universality of

> the rules of the Twelve Tables ... there lies the culture of two thousand years.

LeRoy Fibre Co. v. Chicago, M & St. P. Ry Co., 232 U.S. 340, 354 (1914) (Holmes, J., concurring). In the unique factual circumstances of this case, it is certain that Nebraska has gone too far.

III. The Impact of Nebraska's Preference For One Religion Over All Others Is Substantial

This Court has taught that a governmental practice which only incidentally advances religion* is not prohibited by the Establishment Clause, e.g., PEARL v. Nyquist, supra. This does not mean, of course, that a practice

---

* The state, (Brief at 29) but not the United States as amicus, urges that the prayer exercises are not religious, and are therefore permissible. The state's position is plainly untenable, particularly given Reverend Palmer's testimony that the prayers were religious. [J.A. 56-59]

which directly advances religion, even though it may have only a slight impact on society generally, is not proscribed by the Establishment Clause.

So long as the benefit to a church directly and immediately assists it to propagate its faith, it matters not that, for the church to capitalize on a governmentally conferred benefit, it must make substantial efforts of its own. The assistance to religion conferred by posting the Ten Commandments on the walls of public school classrooms was surely by itself not sufficient to send students scurrying to churches or synagogues. Nevertheless, because such posting was a measurable step toward the institutionalization of state support for religion, it was impermissible. Stone v. Graham, supra.

Here, the benefit to a particular church is direct and immediate. That sect -- whether it is a particular Christian denomination, the Christian church generally, the Judeo-Christian tradition or the "civil religion" -- bears the imprimatur of the legislature as the sect seen fit to minister to its needs; the prayers offered on its behalf are deemed worthy of reproduction and study by members of the public. There is a message in all of this for the citizens of Nebraska. The message is not conveyed explicitly in words, but it is nonetheless real. See W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (acknowledging that religious symbolism is an effective way of communicating ideas).

IV. Even If A Legislature May Open Its Sessions With Prayer, It May Not Prefer One Religion Over All Others

Petitioners suggest in their brief that this case turns on the constitutionality of beginning the legislative day with a prayer. (Brief at 21) They contend that, if the legislature may open with a prayer, it may hire a chaplain, even of one faith, for an extended period of time, and may publish prayerbooks containing only his prayers. There are several difficulties with this argument. First, the constitutionality vel non of legislative prayers was not presented by the petition for certiorari and thus is not before this Court.

Second, the petitioners' "ends justify the means" argument simply does not hold, for as this Court most recently held in Larkin v. Grendel's Den, Inc.,

supra, even where government has a secular purpose, it may use "religious means" only if no secular means are available.

This is hardly a novel proposition. In McGowan v. Maryland, 366 U.S. 420, 449-50 (1961), a case which petitioners believe is dispositive of this one (Brief at, e.g., 24), this Court, after concluding that the contemporary purpose of the Sunday Blue Laws was primarily secular, held that this finding was not alone dispositive of the case. Rather, a further inquiry was necessary to ascertain that the state could not achieve its purposes other than by a practice which had sectarian overtones.

The state insists in this case that it opens the legislative session with a prayer in order to bring the legislature

to order. It is doubtful that this is a sufficient secular purpose to justify the use of a religious practice such as prayer since order could be achieved without use of prayer -- by gavelling the body to order, for instance.

But even if it be granted that the prayer itself is constitutional, it does not follow that the state's interest can only be fulfilled by having a paid chaplain of one faith on the payroll for over fifteen years (and, if petitioners have their way, indefinitely) and by printing his prayers for public distribution. At least 33 states manage to begin the legislative day with a prayer without paid chaplains. (Brief Amicus of the United States at 6.)

Third, petitioners' argument would permit the legislature to restrict, by

statute, the chaplains to clergy of one denomination. Surely, even they must concede that a holding that they can open the session with a prayer would not justify that form of discrimination. Voswinkel v. City of Charlotte, 495 F.Supp. 588 (W.D.N.C. 1980) (city may not contract with Baptist Church for provision of sole police department chaplain). See also Torcaso v. Watkins, supra.

The fallacy in petitioners' argument is that it overlooks the fact that the Establishment Clause was designed in part to prohibit the state from enlisting religion for the state's purposes. The Establishment Clause, itself forecloses "the ends (legislative prayer) justify the (discriminatory) means" argument of petitioners.

V. The Historical Record Is Not Dispositive of this Case

Petitioners, and the United States as amicus, argue that, because the practice of legislative prayers, and of hiring a legislative chaplain, date to the First Congress which drafted and approved the First Amendment, it cannot be that these practices are unconstitutional. The state petitioners insist the long history of these prayers demonstrate that they are secular; the United States insists that, while religious, they are permissible under the Establishment Clause.

Even early on there were those who objected to paid chaplains and prayers on the ground that the practice was inconsistent with the principle of non-establishment enjoined by the

Constitution. [Brief of the United States at 9, 12.] And as the United States conceded in its brief, [Brief at 12-13] the issue arose again on several occasions during the nineteenth century. The practice thus does not have the unquestioned history of acceptance found persuasive in Walz v. Tax Comm'n, supra.

Nor in any event is history as conclusive of this case as petitioners, and the United States, contend. The First Congress was careful to require that there be two chaplains, of two different faiths, to serve the two houses of Congress on an alternating basis. The United States concedes [Amicus Brief at 25] that this practice was designed to forestall the possibility that a permanent chaplain, serving for an extended period of time, would be seen by

the public as symbolically establishing a particular religion.

Petitioners cite Walz v. Tax Comm'n, supra, as holding that practices which have been validated by history do not violate the Establishment Clause. To be sure, Walz holds that, in interpreting the Establishment Clause, history plays a significant role, although in Walz the Court was careful to limit its use of history to those situations where "none was favored over others, and none suffered interference." 397 U.S. at

677.* Walz is also a substantially more

* Michael Malbin, in Religion and Politics: The Intentions of the Authors of the First Amendment (1981) is generally critical of this Court's treatment of the history of the First Amendment, particularly as it has allowed the Court to conclude that aid to religion generally was proscribed. However, Malbin acknowledges that preferences to one religion are, and were intended to be, prohibited, and thus that forms of aid to religion permissible at the time the Constitution was written are now forbidden because the United States is now a "modern, pluralistic nation, with [a] vast multiplicity of sects" (Id at ii).

It is also worth noting that an early authority on the Constitution excluded Moslems, Jews, or infidels from the protection of the Establishment Clause: (Story, Commentaries on the Constitution of the U. S. § 1871 (1833)).

> The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.

complex case than petitioners care to admit.

The petitioner in Walz challenged the grant of an exemption for property used solely for religious purposes but not exemptions for property held by religious institutions used for charitable purposes. This Court relied heavily on the practical difficulty which would attend any effort to implement this distinction and the Establishment Clause problems this would entail. 397 U.S. at 674-75. No such problems of administration exist here.

Moreover, because taxation carries with it the power to destroy, McCulloch v. Md., 17 U.S. (4 Wheat) 316, 431 (1819) grants of exemption "historically

---

The amicus takes it that neither petitioners or the United States believe this history to be controlling.

reflect the concerns ... as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers," 397 U.S. at 673. Prayers in the legislatures, and certainly the hiring of chaplains for indefinite periods of time, have no such socially redeeming virtues.

It may be that legislative prayers, or indeed, the existence of a chaplaincy, have been "grandfathered," see, Walz v. Tax Comm'n, supra; Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980), although, as the Fourth Circuit held in Hall, the "grandfather" principle ought to be reserved for those routinized forms, such as "God save this Honorable Court," which have lost all theological significance. [See, J.A. 32; 36-37] In this case,

Reverend Palmer's prayers are not routinized; on the contrary, they are prepared with an eye towards the events of the day [J.A. 43] Or perhaps such prayers are merely ceremonial notations of the fact "that we are a religious people whose institutions presuppose a Supreme Being," Zorach v. Clausen, 343 U.S. 306, 313 (1952), which are to be tolerated, despite the fact that constitutional violations do not ripen into vested rights, Walz v. Tax Comm'n, supra, 397 U.S. at 678, and even though traditional Establishment Clause analysis leads inexorably to the conclusion that such practices are unconstitutional.*

* The state places heavy reliance on cases holding that public meetings may be opened with prayers. But as already noted that is not the issue in this case. At least two of those cases, Bogen v. Doty, supra, and Marsa v. Wernik, 86 N.J.

232, 253-54, 430 A.2d 888, 899-900 (1981) specifically note that their approval was conditioned on the exercises either not favoring one sect (Bogen) or being non-denominational (Marsa). Both of these cases, as well as Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968), involve unpaid, rotating clergymen of various sects.

Only Colo v. Treasurer, 378 Mass. 550, 392 N.E. 2d 1195 (1979) upholds both a paid chaplaincy and de facto religious discrimination. This latter holding seems based only on the Equal Protection Clause and a record, unlike the present one, containing no indication that clergymen of some sects would not be considered for the position.

Petitioners also rely on a series of decisions permitting the recitation of prayers during public school graduation and baccalaureate services. Those cases are simply inconsistent with Engel v. Vitale, supra, and Treen v. Karen B., 102 S.Ct. 1267 (1982), and merit no deference. Indeed, one state court has held that public schools may not begin the school day by reading the daily prayer offered at the opening of the Congress. State Bd of Educ. v. Bd of Educ., 108 N.J. Super. 564, 262 A.2d 21, aff'd, 57 N.J. 172, 270 A.2d 412 (1970).

Finally, petitioners rely on dicta of several Justices of this Court indicating that legislative prayers are constitutional, most particularly the suggestion

But this Court need not decide in this case whether it would invoke any of these principles in regard to the custom of opening public meetings with a prayer. Rather, what is at issue here is the very different question of whether, even assuming that such prayers may be offered, a state may do so in a way that favors a particular sect. This Court long ago settled that question.

In Niemotko v. Maryland, 340 U.S. 268 (1951) this Court reversed a conviction for disturbing the peace on the ground that the record showed that Jehovah's Witnesses were singled out for

---

to this effect in Zorach v. Clausen, supra, 343 U.S. at 312. Justice Douglas, author of that opinion, subsequently repudiated this view in Engel v. Vitale, supra. In any event, nothing in those dicta suggests that a program of legislative prayer may be operated so as to favor one sect.

prosecution, while other religious groups held similar meetings in the same public park without interference. Under these circumstances, the Court refused to consider the state's argument that all religious practices could be excluded from the public parks, for even if a state could do so, it could not exercise that power in discriminatory fashion. Accord, Fowler v. Rhode Island, 345 U.S. 67 (1953).

Niemotko held only that a state may not intentionally discriminate against unpopular sects; subsequent decisions have held that the state must justify even "a facially neutral religious gerrymander" by demonstrating the presence of a "neutral, secular basis for the lines government has drawn." Gillette v. United States, supra, 401

U.S. at 452. Larson v. Valente, supra, 102 S. Ct. at 1684, n. 23, however, requires a showing of a compelling interest where a state explicitly discriminates between sects.

Here the legislature, by appointing a chaplain of one sect for many years, distinguished, along religious lines, between one church and all others. This is not a case in which a facially secular practice has a disparate impact on different sects. Rather, it is an intentional religious distinction which the state has not justified by any secular purpose, let alone by a

compelling one.*

At a minimum, the state would have to show that it had no alternatives to the appointment of one chaplain every two years, for example, or the use of lay volunteers, or rotating chaplains, practices followed in numerous other

---

* Although the statute in Larson was not cast explicitly in terms of a favored sect, the inevitable result of the line drawn there was to distinguish between established and newer churches. Accordingly, this Court characterized the distinction as tantamount to an explicit one between well-established churches and less established churches.

The United States government contends (Brief Amicus at 22, n.15) that the rule of Larson applies only to statutes which discriminate between religions. Niemotko, Fowler, and Yick Wo. v. Hopkins, 118 U.S. 356 (1886) all stand for the proposition that there is no distinction between discriminatory statutes and discriminatory enforcement.

states.* And even if the result would be that, on occasion, no prayer was offered, the state would be required to show that there was no other substitute for prayer to set the tone for the day's deliberations.

VI. Payment of the Chaplain's Salary, and the Printing, at State Expense, of the Prayerbooks Are Unconstitutional

This Court's decisions have emphasized that the Establishment Clause was aimed in particular at compelled financial support for churches and ministers. Justice Black put the matter boldly in Everson v. Bd of Educ., supra, 330 U.S. at 16:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions

---

* The petitioners argue that any such alternative would necessarily be far more entangling and divisive than the current system, thus attempting to draw a parallel between this case and Walz v. Tax Comm'n, supra. There is simply no evidence from other states in support of this claim, nor does the practice of the localities where such is the practice, see note to p. 34, supra.

> whatever they may be called, or whatever form they may adopt, to teach or practice religion.

See also Walz v. Tax Comm'n, supra, 397 U.S. at 668 (1970).

This insistence is not surprising, given the roots of the Establishment Clause in the struggle over Virginia's attempt to tax its citizens to pay for the upkeep of the established church. This Court has recited that history on several occasions. It would serve no useful purpose to restate it here. Independent, then, of any questions of a religious preference, Nebraska's practices are unconstitutional.

It cannot be seriously contended, petitioners' arguments notwithstanding, that Reverend Palmer's invocations are not religious. He conceded as much, [J.A. 56-59], although he appeared to believe that the prayers did not advance

religion because they did not seek to make converts to any particular faith. [J.A. 61] Nor can there be any doubt that the payment of a chaplain's salary, particularly where that officer's duties are limited to the recitation of an invocation at the beginning of each legislative day,* is payment for the performance of religious duties.

The petitioners argue that, if the legislature may open the day with a prayer, it may pay for a permanent chaplain to recite that prayer. The superficial appeal of this argument does not withstand analysis, for it ignores

---

* Different, and more difficult, issues would be presented if the chaplain performed other duties, such as counselling, and the persons counselled would likely confide only in a clergyman who was a member of the same institution, particularly one such as a police department, organized along military lines.

the special significance the Founders placed on not taxing citizens to pay for the performance of religious duties. That the state, for example, must permit college students to use facilities for religious services, Widmar v. Vincent, supra, does not mean that it can pay for the construction of chapel facilities. Tilton v. Richardson, supra. See also Voswinkle v. City of Charlotte, supra.

Petitioners contend, citing McDaniel v. Paty, 435 U.S. 618 (1978), and Bradfield v. Roberts, 175 U.S. 291 (1899), that there is no prohibition of paying religious orders or clergy for services rendered, and that such a prohibition would interfere with the Free Exercise of religion. While both of these claims are correct statements of

the law, neither McDaniel nor Bradfield is relevant here. In both, the state paid a religious person (or order) for providing it with secular services.* Here, however, the state is impermissibly paying for the provision of religious services in a secular setting, Hunt v. McNair, 413 U.S. 734, 743 (1973).

Moreover, over and above the special status accorded the prohibition on spending funds to aid religion, there is yet another reason why the payments here are impermissible -- because there is no showing that it would be impossible to have a daily prayer without a paid

* Accord, Thomas v. Schmidt, 397 F. Supp. 203 (D.N.H. 1975), aff'd, 539 F.2d 701 (1st Cir. 1976); School District of Hartington v. Nebraska State Bd. of Educ., 188 Neb 1, 195 N.W.2d 161, cert. denied, 409 U.S. 921 (1972) (both involving leases of church property).

chaplain. Petitioner attempted to show that without payment, clergy would not accept the task of offering a daily prayer. But even if this is so, and the experience of 33 states belies it, there is surely no rule of law which requires that prayers be offered by members of the clergy.

An affirmance here would not invalidate paid chaplaincies in prisons, hospitals, or the military. Those chaplaincies have little in common with the one at issue in this case, beyond a common name. As Justice Brennan observed in School District of Abington Twshp v. Schempp, supra, 374 U.S. at 296-8:

> There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for

> churches and chaplains at military establishments [and in prisons] for those in the armed services [and in prisons] may afford ... such example[s].
>
> * * *
>
> [S]uch provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause.

Accord Rudd v. Ray, 248 N.W. 2d 125 (Iowa 1976). Remmers v. Brewer, 361 F. Supp. 537, 543 (S.D. Iowa 1973) ("so long as no particular religion is fostered"); Horn v. People, 321 F. Supp. 961, 964 (E.D. Cal. 1968).*

---

* Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972), holds that, even in the context of prison chaplains, the state may not arbitrarily discriminate against members of some faith in the hiring of chaplains.

Members of the legislature are not deprived of their freedom. No Free Exercise claim can therefore be made to sustain the appointment of a chaplain to legislative officials. The appointment of a paid chaplain must therefore be "assumed to contravene the Establishment Clause."

Conclusion

For the reasons stated, the judgment should be affirmed.

Nathan Z. Dershowitz
Attorney for the Amicus
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

Marc D. Stern
Of Counsel